SUPREME COURT, U. S.

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IN THE

# Supreme Court of the United States

**October Term, 1965**

**No. 1236**

HYMAN D. SIEGEL,

*Petitioner,*

—v.—

THE PEOPLE OF THE STATE OF NEW YORK and FRANK S. HOGAN, Esq., individually and as District Attorney of New York County,

*Respondent.*

## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

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## PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK, OR TO THE APPELLATE DIVISION OF THE SUPREME COURT OF THE STATE OF NEW YORK, FIRST DEPARTMENT

Petitioner, Hyman D. Siegel, prays that a writ of certiorari issue to review a certain order of the Court of Appeals of the State of New York entered in the above entitled case as described *infra;* or, should such be jurisdictionally more appropriate, to review a certain order of the Appellate Division, First Department, Supreme Court of the State of New York, which has also been entered in the above entitled case and is described *infra.*

## Opinions Below

The Appellate Division did not render an opinion. The opinion of the Court of Appeals, printed as Appendix A hereto, *infra,* is reported in 16 N.Y. 2d 330, 266 N.Y.S. 2d 386.

## Jurisdiction

The order (remittitur) of the Court of Appeals of the State of New York here sought to be reviewed is dated December 30, 1965 (Appendix B hereto, *infra*). Mr. Justice Harlan has granted an extension of time to and including April 19, 1966, to file this petition for certiorari. The order of the Appellate Division here alternatively sought to be reviewed is dated May 21, 1964 (Appendix C hereto, *infra*). The aforementioned order of the Court of Appeals of December 30, 1965 vacated a prior order of that Court dated October 1, 1964 which had granted leave to appeal from the Appellate Division's order of May 21, 1964 just mentioned.

As recited in more detail in our Statement, *infra,* this litigation has arisen out of efforts by petitioner Siegel, a member of the Bar of the State of New York, to obtain judicial redress against electronic eavesdropping of the trespassory room-space type and telephone wiretapping by police in his private law office premises. The proceeding which directly gives rise to this certiorari application* was commenced by petitioner Siegel as an original proceeding in the Appellate Division for redress against the eavesdropping. Petitioner Siegel brought that original proceeding in the Appellate Division on the theory of a *civil* suit invoking the equity side of the plenary original jurisdiction of the Supreme Court of New York (including the Appellate Division of that Court), and on the additional or alternative theory of a proceeding under certain New York State legislation (N.Y. Civil Practice Law and Rules, Rule 5704(a)—details *infra*) which empowers the Appellate Di-

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* A prior, connected proceeding is described in our Statement, *infra.*

vision to review any ex parte order of the Supreme Court of that State—it being petitioner Siegel's theory in this latter regard that under the statute just referred to (N.Y. C.P.L.R. 5704(a)) the Appellate Division could review any ex parte eavesdropping order issued under New York's legislation for permissible eavesdropping by ex parte Court order (N.Y. Code Crim. Proc. §813-a (details *infra*)).* The Appellate Division denied any relief, the Court of Appeals as indicated granted leave to appeal, and finally the Court of Appeals as also indicated vacated the order granting leave to appeal. This final decision of the Court of Appeals —vacating its prior order granting leave to appeal—was by a vote of four to three, Chief Judge Desmond writing the dissenting opinion in which Judges Fuld and Van Voorhis joined (Appendix A hereto, *infra*).

The dispositive issue in the case, both as litigated and as decided in the proceedings below (details *infra*), was whether the Federal constitutional right of individual privacy against electronic eavesdropping (especially of the trespassory room-space type) entitles petitioner Siegel to seek relief in a State court of equity for the protection of such constitutional right, by obtaining (1) compulsory judicial process for disclosure of any authority for the eavesdropping on the basis of any Court order, and (2) judicial review of the validity of any such supposed permissive Court order, without having to await criminal prosecution founded on the eavesdropping, i.e., without having to wait for an

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* As will appear, this eavesdropping case is unusual in that the petitioner's quite specific eavesdropping and wiretapping allegations not only stand undenied on the record but also stand in the further record setting of a refusal by our adversaries even to disclose whether their undenied eavesdropping has been done pursuant to any permissive Court order.

"opportunity" to move for exclusion or suppression of the eavesdrop evidence in a criminal trial.* The necessary meaning and effect of the four-Judge majority disposition of the case in the Court below, as we shall demonstrate, is that the Federal Constitution does not afford the citizen such equity protection in the New York State courts, or any other judicial-hearing protection against Federally unconstitutional trespassory room-space eavesdropping except a criminal *trial* motion for exclusion or suppression.**

The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), since the petitioner is claiming rights, privileges or immunities under the Constitution of the United States (Fourth Amendment search and seizure, Fifth Amendment self incrimination, Fourteenth Amendment due process), and under 47 U.S.C. §605 (wiretapping); and since, if an undisclosed ex parte State court eavesdrop order exists, there is necessarily drawn in question the validity of a State statute (N.Y. Code Crim. Proc. §813-a—ex parte eavesdrop orders) on the ground of its being repugnant to the Constitution of the United States.

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* As will appear, it is by no means clear that the New York State Courts would entertain such a motion for exclusion or suppression of eavesdrop evidence even in the criminal proceeding itself except through the avenue of a motion *during* the actual criminal trial, i.e., the New York State decisional law is not yet settled as to whether a *pretrial* motion for this purpose is available even in the criminal proceeding itself.

** See the last preceding footnote. Siegel was indicted, evidently on the basis of the eavesdrops, *after* the commencement of his efforts for equity relief which culminated in the within proceeding which he originated in the Appellate Division (details *infra*).

## Questions Presented

1. Where a lawyer in private practice claims that governmental authorities of the State of New York have employed electronic eavesdrops to audit private conversations in his private law-office room space and on his private law office telephone, secretly and without his permission or knowledge, and where he avers the sources of his information and the basis of his belief that such unpermitted and secret eavesdropping occurred, and where the governmental authorities involved do not deny the eavesdropping but resort to a total policy of official secrecy concerning such eavesdropping including even an absolute secrecy as to whether the eavesdropping was done pursuant to any court order, does a civil action in equity lie on behalf of such citizen to compel disclosure of whether any such permissive court order exists and if so to compel disclosure of the contents of such court order and of the showing made in the application for such court order, i.e., does such a civil action in equity lie for the vindication of the citizen's legal and constitutional rights of privacy, due process of law, protection against unreasonable search and seizure, privilege against self incrimination, and rights under Federal and State statutory law to be protected against electronic eavesdropping?

2. In the circumstances recited in the foregoing question No. 1, and where the Appellate Division of the Supreme Court of the State of New York (sitting as the Court of first instance herein), without opinion and solely on the basis of the petitioner's original moving papers, his briefs, and an opposing brief, has denied the equity relief sought, and where leave to appeal at first granted by the State's highest Court (the Court of Appeals) was later vacated with

opinion after argument, so that the petitioner's State Court equity proceeding has never been permitted to reach the stage of even ascertaining by judicial order of disclosure whether the allegedly illegal and unconstitutional eavesdropping was done pursuant to any *ex parte* court order or whether any such *ex parte* court order was validly issued, has the citizen been denied his legal and constitutional rights for a fair opportunity, in a judicial hearing, to seek and obtain a judicial order vacating any invalid *ex parte* court order for eavesdropping or disapproving any such eavesdropping done without any such *ex parte* court order?

3. If §813-a, N. Y. Code Crim. Proc. be construed as authorizing an eavesdropping search for mere evidence of crime as distinct from a search based upon reasonable or probable cause to believe that a crime has been committed, i.e., as distinct from a search for the fruits or instrumentalities of crime, is that statute unconstitutional within the meaning of the Fourth, Fifth and Fourteenth Amendments of the United States Constitution as amounting to a statute which authorizes the historically forbidden type of general search warrants or searches for mere evidence of crime?

4. As to the trespassory room eavesdrops in the constitutionally protected area of petitioner Siegel's private law office, is not such eavesdropping intrinsically unconstitutional under the Federal Fourth, Fifth and Fourteenth Amendments, so that no hearing as to "probable cause" for any permissive court order for such room eavesdropping could serve any useful purpose because such room eavesdropping could not conceivably be constitutional?

5. As to the telephone wiretaps, should not *People* v. *Dinan*, 11 N.Y. 2d 350, cert. den. 371 U.S. 877, be disapproved

and such wiretaps be declared illegal and unconstitutional? And if so, is not a hearing as to "probable cause" unnecessary, the same as in the case of the room eavesdrops?

6. In any event, must not the telephone eavesdrops fall together with the room eavesdrops owing to the practical and technological impossibility of segregating the "evidentiary" products of these two respective forms of eavesdrops when they are conducted simultaneously in the same room space so as to include necessarily within the room eavesdropping the eavesdrop auditing of the words spoken on the telephones by persons present in that room space?

## Statutes and Constitutional Provisions Involved

The case involves the Fourth (search and seizure), the Fifth (self incrimination) and the Fourteenth Amendments of the United States Constitution. It also involves 47 U.S.C. §605 (wiretapping).

The State statutory and constitutional provisions involved are: N.Y. Constitution, Article 6, §7(a), creating the Supreme Court of the State of New York as a court of general original civil jurisdiction; N.Y. Code Crim. Proc. §813-a, authorizing ex parte judicial orders for eavesdropping; N.Y. Code Crim. Proc. §§ 813-c to e, motion to suppress evidence; and N.Y. Civil Practice Law and Rules, Rule 5704(a), authorizing the Appellate Division of the Supreme Court of the State of New York to review any ex parte order of the Supreme Court or a Justice thereof.

The above provisions, except the familiar Federal constitutional provisions, are printed in Appendix D hereto *infra*.

## Statement of the Case and of How the Federal Questions Are Presented*

### 1. The Background Happenings Which Led To The Original Proceeding In The Appellate Division; The Theory Of That Proceeding.

(As we mentioned *supra* under the heading "Jurisdiction", the disposition of this case in the Court below necessarily involved the determination that no remedy is available in the Courts of the State of New York, by way of

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* Of the items in the certified record herein, the following are believed to contain everything of substance for the purposes of this certiorari application, and as to each of the items now to be mentioned we are filing extra copies (the opinion of the Court below is of course printed with this petition (Appendix A hereto *infra*)): (1) The printed "Record on Appeal" in the Court below, nine extra copies filed herewith; this printed record item has a white cover and contains fifteen pages; it contains our "Notice of Petition" and our "Petition" which constituted our moving papers in the original proceeding with which we commenced this matter in the Appellate Division; it also contains the order of the Appellate Division which denied us relief. (2) The printed (white cover) "Notice of Motion and Affidavit for Permission to Appeal to Court of Appeals", nine extra copies filed herewith. (3) Another printed "Record on Appeal", captioned in the New York Supreme Court, Appellate Division—First Department (bound in blue cover and of larger page-size than the Record on Appeal in the Court below above mentioned, which is bound in white cover), nine extra copies filed herewith, which we filed in a related appeal in the Appellate Division whose pertinence is explained *infra*.

In order that the Court may be fully informed as to our presentation in the Court below, we are also filing herewith ten copies of our printed "Brief for Petitioner-Appellant Hyman D. Siegel" in the Court below, and ten copies of our printed "Reply Brief for Petitioner-Appellant Hyman D. Siegel" in the Court below.

The two principal record items (aside from the opinion below) are the above mentioned white-cover printed "Record on Appeal" captioned in the Court below, which we shall cite as "R.C.A."; and the above mentioned blue-cover Record on Appeal, captioned in the Appellate Division, which we shall cite as "R.A.D." Our references to the certified record filed herein will appear as "R.".

equitable or other civil relief for discovery and prevention, at the behest of a citizen who demands protection against claimedly unconstitutional governmental eavesdropping. We are again preliminarily emphasizing this necessary aspect of the decision here sought to be reviewed, and we shall indicate the pertinent further details concerning this *infra,* because we well realize that this certiorari application is useless if the decision below be deemed to rest merely upon some State procedural ground. As will appear, the decision sought to be reviewed plainly has the substantive constitutional effect above suggested, and is not merely a matter of our having invoked one State procedure rather than another. The following unavoidably detailed history of the factual and procedural background of this case is presented, then, with a view to the problem of this Court's jurisdiction, i.e., with a view to demonstrating that the decision below does not rest merely on a State procedural ground (or on any other adequate State ground).)

This case arose out of an investigation of the New York State Liquor Authority. Siegel is an attorney who represented clients before the latter Agency. Siegel was himself indicted upon charges involving the State Liquor Authority. However, the subject matter involved in the present certiorari application had its inception prior to Siegel's indictment, the date of the indictment being May 22, 1963 (R.A.D. p. 40).

Prior to that indictment, and prior also to Siegel's institution of the within original proceeding in the Appellate Division, Siegel had sought, in a proceeding in the Supreme Court of New York, New York County, relief similar to that which he sought by original process in the Appellate Division (R.A.D. pp. 7-34).

In the aforesaid Supreme Court proceeding Siegel had applied (on May 14, 1963) for an order directing a hearing to be held by a Justice of the Supreme Court to determine whether certain evidence in Grand Jury proceedings which involved Siegel in connection with the State Liquor Authority had been obtained by eavesdropping with or without Court order and whether such eavesdropping was constitutional and lawful (R.A.D., pp. 7-34).* Said application by Siegel in May, 1963, in the Supreme Court, New York County, was denied by a final order of June 7, 1963 by Mr. Justice Gellinoff, of that Court (R.A.D., p. 6).** The sole reason stated by Mr. Justice Gellinoff for denying the appli-

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* Earlier, on May 1, 1963, a similar proceeding had been brought on Siegel's behalf in the name of his attorney Matthew H. Brandenburg as petitioner or movant. This earlier proceeding was dismissed by Hon. Irving L. Levey, J. (S. Ct. N.Y. Co.) as "premature." An appeal by Brandenburg (for Siegel) to the Appellate Division was withdrawn in view of the new proceeding (May 14, 1963), in Siegel's own name as petitioner or movant and upon new papers, which became the above-mentioned proceeding before Mr. Justice Gellinoff. See R.A.D., pp. 33-34, 36-37.

** As recited *infra*, Siegel appealed to the Appellate Division from Mr. Justice Gellinoff's order. The printed "Record on Appeal" in that appeal—being the above-mentioned blue-cover item of which extra copies are filed herewith, and which we are citing herein as "R.A.D. "—had been printed, and lodged in the Appellate Division, prior to the commencement of our within original proceeding in the Appellate Division. That printed "Record on Appeal" was available to and at our request was presumably considered by the Appellate Division in its consideration of our subsequent original proceeding. We also suggested in a letter to the Clerk of the Court below in connection with the filing of our motion papers for leave to appeal, that said printed "Record on Appeal" be made available to that Court by the Clerk of the Appellate Division when the latter official transmitted to the Court of Appeals the record in the instant proceeding and we are informed that this was done. The factual recitals in this petition are based in part on the aforementioned blue-cover printed "Record on Appeal", which is in the certified record herein as "p. 15".

cation for a hearing was that Siegel's moving papers contained no "competent proof" that electronic devices were concealed in Siegel's offices or that his wire was tapped, or that any evidence against him which was submitted to the Grand Jury was illegally or improperly obtained (R.A.D., pp. 69-72). Mr. Justice Gellinoff never allowed the proceedings to advance to the point at which evidence as to those allegations in the moving papers would have been introduced by Siegel in the course of a hearing for such purpose, the decision of Mr. Justice Gellinoff being grounded solely (as just said) on his evaluation of the moving papers themselves.

The aforesaid proceedings before Mr. Justice Gellinoff had been designed on Siegel's behalf to initiate a distinct proceeding in the Supreme Court, in the nature of a special proceeding within the meaning of the then operative §§5 and 7(a) of the New York Civil Practice Act, in which Siegel was invoking the civil jurisdiction of the Supreme Court as an equity court of general original jurisdiction (N. Y. Const., Art. 6 §7(a)). See R.A.D., pp. 10-34, 44-55.

As mentioned, at the time of the commencement of the proceedings before Mr. Justice Gellinoff (May 14, 1963), Siegel had not been indicted in the then pending Grand Jury proceedings concerning the State Liquor Authority. However, between the time of commencement and the return day of the notice of motion before Mr. Justice Gellinoff (the motion was returnable May 27, 1963, R.A.D., pp. 7, 41), Siegel was indicted (May 22, 1963) (R.A.D., p. 40). Since, as said, the proceedings before Mr. Justice Gellinoff had been designed on Siegel's behalf to obtain equitable relief on the civil side of the jurisdiction of the Supreme Court of the State of New York and were designed not to partake of

or to be absorbed into any criminal proceedings (either of a pre-indictment or post-indictment character), we here respectfully emphasize the importance of bearing in mind that the aforesaid civil proceedings were commenced and became lodged prior to the handing down of the aforesaid indictment of May 22, 1963.

An appeal, in the form of two separate appeals (for technical reasons), was taken by Siegel to the Appellate Division, First Department, from the aforesaid order of Mr. Justice Gellinoff (R.A.D., p. 3). Those appeals remained pending in the Appellate Division throughout the within proceedings below; the appeals continued in abeyance pending final disposition of the within proceeding brought by Siegel in the Appellate Division,* which we instituted in November 1963. We brought this original proceeding in the Appellate Division, notwithstanding the then pendency also of our appeals to the Appellate Division from Mr. Justice Gellinoff's order, because our attention had meanwhile been directed to what appeared to us to be the interesting new procedural avenue

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* By what we claim was a procedural inadvertence in the office of the Clerk of the Appellate Division, the appeals were dismissed on January 14 and 20, 1966 by the Appellate Division for lack of prosecution (R. 47, 48); our motion for reinstatement of the appeals is now pending in the Appellate Division (R. 48). It was the understanding of the parties that our appeals from Mr. Justice Gellinoff's order would be held in abeyance pending completion of the within proceeding which we commenced as an original proceeding in the Appellate Division. In fact, we had invited the Appellate Division, if it saw fit, to consolidate the pending appeals with our new original proceeding. See R. 5-18; and see "Petitioner's Opening Brief", p. 2, in our proceeding which originated in the Appellate Division. We respectfully take the position that, if such be necessary to be considered for the purposes of this certiorari application, our within proceeding which originated in the Appellate Division should be treated as integral and continuous with the proceeding before Mr. Justice Gellinoff, the latter proceeding having been undisputedly pre-indictment.

then recently opened up by the new N.Y.C.P.L.R. §5704(a) —as to which we shall speak more fully after the following further general observations about these inter-connected civil proceedings.

The purpose of the proceedings before Mr. Justice Gellinoff—as also was the purpose of the within original proceeding in the Appellate Division—was and is, in essence, to secure judicial relief against what Siegel contends is an infringement of his Federal and State constitutional and statutory rights to be free from unreasonable search and seizure of alleged evidence of crime, such search and seizure having been effected herein by electronic police eavesdropping of conversations in petitioner's private law office, and by electronic police wiretapping of his private law office telephone. These proceedings have not, however, been conceived or designed merely as proceedings of the familiar sort for the "suppression" of evidence obtained by unreasonable search and seizure. The important distinction between the usual "motion to suppress" on one hand, and these proceedings (i.e., the within (Appellate Division original proceeding and the companion "Gellinoff" appeals in the Appellate Division) on the other hand, is that—unless we had obtained a ruling below that the eavesdrops (especially the *room-eavesdrops*) are *eo ipse* unconstitutional—the *initial* judicial relief aimed at by these proceedings was relief which would be the *precursor* to a "motion to suppress" of the ordinary sort. This alternative precursor relief which we have sought and seek consists of two things: (1) An order to the respondents to disclose what, if any, is the basis of their authority to perpetrate the room eavesdropping and the telephone wire-tapping which we allege; and (2) if respondents claim that their room eavesdropping and tele-

phone wiretapping were under authority of any Court order, we seek a full judicial hearing to determine whether such order was issued upon "probable cause" or "reasonable cause"—unless, again, such hearing be deemed unnecessary (and we believe it is unnecessary at least as to the room eavesdrops) on the ground that unconstitutionality appeared here on the face of the eavesdrop situation. And if it should be concluded that either the room eavesdrops or the telephone eavesdrops are not unconstitutional on their face, then, when and if the two successive branches of the alternative precursor relief which we seek—the order to disclose the authority for the eavesdropping and wiretapping, and the hearing as to "probable cause" for issuance of any court order authorizing such eavesdropping and wiretapping—become consummated, we shall be in a position to determine whether we should move to suppress illegal evidence, or move to dismiss any indictment based thereon, or move for inspection of Grand Jury minutes, or otherwise further move in regard to such illegal evidence.

(In connection with the above there should be borne in mind also our earlier suggestion that as a practical matter the telephone wiretaps must fall together with the room eavesdrops owing to the practical impossibility of segregating their respective "evidentiary" products.)

The above description of the theory of our civil proceedings was presented in our moving papers and briefs in both of the Courts below (e.g., R.C.A. 3-10; Br. for Pet'r in Court of Appeals, pp. 6-18, ten copies filed herewith). We also urged in the Courts below (*ibid.*) that in the conception which we hold as to the nature of the original proceeding which we instituted in the Appellate Division, it does not matter whether there exist any New York State

statutory provisions for the bringing of a proceeding of this type; and we referred the Courts below to the language of, e.g., *People* v. *Politano*, 17 A.D. 2d 503, 235 N.Y.S. 2d 712, 717 (3rd Dept. 1962), that "where constitutional rights are involved the failure of the statute to provide an effective procedure to reach the question at bar is not a bar; and the Court is deemed possessed of sufficient inherent powers." We therefore urged in the Courts below (*ibid.*) that it does not matter whether any New York State statute contemplates a proceeding to compel disclosure of the claim of basis of authority for room eavesdropping or telephone wiretapping, or whether any such statute contemplates a hearing to test out the "probable cause" for any court order allowing room eavesdropping or telephone wiretapping; and that it *especially* does not matter whether any such statute exists with respect to the *room eavesdropping* phase. Statutory remedy or no statutory remedy, we urged in the Courts below (*ibid.*), a proceeding for the relief which we here have been seeking should have been entertained by Mr. Justice Gellinoff, who presided over a court of general original equity jurisdiction, and it should have been entertained by the Appellate Division in our proceeding which originated in that Court, because such proceedings invoked those Courts' plenary judicial authority (and duty) to protect the rights of the citizen against unreasonable search and seizure and self-incrimination under the Fourth, Fifth and Fourteenth Amendments of the Federal Constitution, and because Article VI of the Federal Constitution binds "the judges in every state * * *, any thing in the * * * laws of any state to the contrary notwithstanding", to enforce the Federal Constitution as "the supreme law of the land".

These contentions which we urged before both of the Courts below were evidently rejected by the Appellate Division (which denied relief without opinion) and by the majority Judges of the Court of Appeals (*infra*). They were, however, forcefully and we may say eloquently endorsed by Chief Judge Desmond of the Court of Appeals and by his colleagues in dissent, Judges Fuld and Van Voorhis.

**2. The Averments Made By Petitioner Siegel In The Proceeding Which He Commenced As An Original Proceeding In The Appellate Division; The Denial Of Relief By The Appellate Division.**

Invoking the above-described theory that he was entitled to bring a civil suit in equity for protection of his constitutional right of privacy, Siegel instituted the within suit as an original proceeding in the Appellate Division, by a "Notice of Petition" and a "Petition" (R.C.A. 1-10). The averments in the latter petition—see also our affidavits in the earlier proceeding before Mr. Justice Gellinoff (R.A.D. 10-34)—were to the effect that*: Electronic devices had been discovered which, over a period of more than a year, eavesdropped upon conversations in Siegel's private law office suite and upon his telephone in that office; that the duration of those eavesdrops over such period of many months was unmistakably demonstrated by the District Attorney's possession and use of transcripts or alleged transcripts which could only have come into being as the product of such eavesdrops; that the way in which those

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* The following summary of our averments in the Appellate Division was in substance accepted by Chief Judge Desmond and his colleagues in dissent in the Court below as having effectively posed to the Appellate Division the issues of constitutional fact which we claim were necessarily presented to the latter Court.

transcripts were used by the District Attorney was to confront persons with the contents of those transcripts in order to intimidate them into testifying inculpatingly against Siegel before the Grand Jury; that it was not disclosed to the Grand Jury that the testimony of the persons just mentioned emanated from the poisoned and illegal eavesdrop-obtained evidence; that the telephone eavesdrop consisted of an electronically *intercepting* type of device; that neither Siegel nor anyone authorized to act in his behalf ever gave consent to these eavesdrops; that Siegel had no knowledge as to whether the eavesdropping was preceded by the issuance of any court order; and that Siegel was entitled to the relief prayed for on the basis of the several grounds and reasons set forth in the petition, which asserted both constitutional and statutory grounds and reasons.

The factual basis of Siegel's knowledge that his law office had been eavesdropped ought to be more specifically noted (R.C.A., p. 5):

> "5. The sources of my information and the basis of my belief that my private office telephones and my private office room space have been subjected to electronic eavesdrops by the respondents as aforesaid, consist of the following: (1) Information received from Bernard B. Spindel, residing at Ludingtonville Road, R.D. #2, Holmes, New York, who has been an electronics technician for more than twenty years, specializing in the development, design and manufacture of eavesdropping and detection devices, who was retained by me and my aforesaid attorney, Mr. Brandenburg, on or about April 28, 1963 and who made an electronic investigation commencing May 1, 1963 in and about my aforesaid private law office premises, which investigation disclosed that wiring

had been installed for the purpose of what are technically known as direct wire eavesdropping devices; (2) Milton Winkler, Esq., an attorney and counselor at law of this State who shared my aforesaid private law office suite and who has informed me and my aforesaid attorney of facts indicating that telephonic and non-telephonic conversations in said office were electronically eavesdropped by the respondents; (3) several clients of mine, whose names I am prepared to disclose to this Court in due course and upon due instruction or order of this Court, who (the aforesaid clients) have informed me and my aforesaid attorney of facts indicating that telephonic and non-telephonic conversations in my aforesaid law office premises were electronically eavesdropped by the respondents; (4) the stenographic transcript of an examination before trial of eight certain witnesses for the defendant in an action which I instituted in the Civil Court of the City of New York, County of New York, against the landlord of my aforesaid private law office premises, said action being entitled "Hyman D. Siegel, Plaintiff, against Tenth Manhattan Corp., Defendant", which action I instituted for damages for breach of leasehold in connection with the electronic eavesdropping herein referred to, and which stenographic minutes contain matters supporting my information and belief that telephonic and non-telephonic conversations in my aforesaid pri- law office premises were electronically eavesdropped by the respondents."

The Appellate Division, without rendering an opinion, denied Siegel's petition* (R.C.A. 13-14). As previously in-

* Denominating it a "motion" (R.C.A. 13-14), probably because we had filed anterior "motion papers" (R. 7-13), for which we later substituted the above-described "petition" (R.C.A., pp. 1-10).

dicated, the Appellate Division rendered this decision solely on the basis of our moving papers and our briefs, plus an opposing brief by our adversaries, who did not file any opposing papers by way of affidavit or by way of any pleading or motion; i.e., except for a brief, they did not file anything by way of an answer or other response to our moving papers. Nor did the Appellate Division hear oral argument.

### 3. The Proceedings In The Court Below (The New York Court of Appeals).

The Court of Appeals of the State of New York, upon extensive printed motion papers and supporting brief which we filed in that Court*, granted leave to appeal from the Appellate Division's order denying us relief; this grant of leave to appeal to the Court of Appeals was by the full Court (R.C.A. 11); this granting of leave to appeal came about, also, after the Appellate Division had denied us permission to appeal to the Court of Appeals (R. 4).** We are respectfully emphasizing this evidently deliberate action of the Court below in having at first accepted our case for full review, because we want this Court to know, again,

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* The motion papers are part of the certified record herein at R. 45; nine extra copies of those motion papers (printed) are filed herewith. We are not burdening the Court with our printed brief in support of the motion for leave to appeal to the Court of Appeals because the contents thereof are in substance repeated in our brief on the merits in the Court of Appeals, of which ten copies are filed herewith ("Brief for Petitioner-Appellant Hyman D. Siegel" in the Court of Appeals, State of New York).

** We had also filed a Notice of Appeal as of right to the Court of Appeals (R. 1-3), by way of an alternative or supplement to our motion for permission to appeal. Under the practice of the Court of Appeals the vacating of the order granting leave to appeal (*infra*) is believed to dispose also of the appeal taken as of right.

that the ultimate four-to-three decision of the Court of Appeals whereby the case was disposed of by an order vacating the prior grant of permission to appeal is not to be taken as simplistically connoting that our case was disposed of by the highest Court of the State of New York on a mere ground of State procedural law. The majority and minority opinions of the Court below (Appendix A hereto, *infra*) make it clear that the case was disposed of in that Court on a squarely drawn issue of Federal constitutional right, as we point out *infra*.

The Federal constitutional questions which we urged in the Court of Appeals are set forth at pp. 19-24 of our brief on the merits in that Court (the printed "Brief for Petitioner-Appellant Hyman D. Siegel", captioned in the Court of Appeals, State of New York, ten copies of which are filed herewith).

The division among the Judges in the Court of Appeals needs to be noted in detail. The "majority" opinion is actually only a two-Judge opinion (by Judges Burke and Scileppi) (Appendix A hereto, *infra*). In essence the latter opinion rules that petitioner Siegel was without any right to bring an action on the civil or equity side with regard to the eavesdropping because "if the appellant's premises were the subject of an eavesdrop order he is protected, as a citizen, by the requirements of section 813-a [N.Y. Code Crim. Proc.]". This necessarily means, as we demonstrate under the "Reasons for Granting the Writ", *infra*, that Judges Burke and Scileppi of the Court below were deeming the ex parte judicial eavesdrop order feature of N.Y. Code Crim. Proc. §813-a to be a self-contained, non-reviewable ex parte procedure, i.e., Judges Burke and Scileppi

were apparently assuming that it is to be taken for granted that *any* ex parte judicially granted eavesdrop order was *presumptively* protective of the rights of the party affected and was thenceforth forever not further reviewable or even justiciable—except perhaps in connection with proceedings for suppression of evidence in a criminal prosecution (as to which last we shall have more to say later in this petition). While it is true that the "majority" opinion of Judges Burke and Scileppi spoke also of State procedural aspects posed by our suit for civil (equity) relief against the eavesdropping, the *ratio decidendi* of that two-Judge opinion inescapably is that the citizen (in New York State) has no constitutional right of judicial protection on the civil (equity) side as against claimedly unconstitutional eavesdropping by State police officers.

One further point in connection with the opinion of the Judges Burke and Scileppi which needs to be noted here is that those two Judges evidently were of the impression that the record in this case established that ex parte eavesdrop orders had been obtained (see the language in the first sentence of the last paragraph of the Burke-Scileppi opinion to the effect that "here, orders were obtained", and that "a judicial officer had already determined the propriety of the methods sought to be used by the law enforcement agency" (Appendix A hereto, *infra*)). It is incontrovertible that there is not one word in this record to support the idea that the eavesdropping in Siegel's private law office had been previously authorized by any Court order—the three-Judge dissenting opinion of the Court of Appeals, written by Chief Judge Desmond, repeatedly notes that the State authorities in this case had chosen to keep secret the facts as to whether or not they had any Court order (*ibid*).

The two other Judges of the Court below who completed the making up of the majority, Judges Dye and Bergan, concurred "on the ground that any action of the Appellate Division in this proceeding is purely discretionary and not reviewable by this court" (*ibid*). While this at first blush might appear to suggest that two of the four Judges of the majority in the Court below decided the case on a State procedural ground, the situation is by no means so simple. In the first place, anyone who reads the remarkably forceful and constitutionally explicit and direct judicial challenge pronounced in the three-Judge dissenting opinion written by Chief Judge Desmond cannot fail to perceive that what had really divided the Court, as between "majority" and "minority", was the rock-bottom Federal constitutional issue of whether the Courts of the State of New York are under a duty to hearken to the constitutional prayers of a citizen in the position of the within petitioner Siegel for civil (equity) protection against claimedly unconstitutional police eavesdropping. Second, the concurring position of Judges Dye and Bergan must be read in the light of the fact that our prayers for relief in the lower Court (the Appellate Division) were not addressed merely to that Court's authority to review ex parte orders under N.Y. C.P.L.R. 5704(a), but to that Court's general original jurisdiction as a court of equity forming an integral part of the Supreme Court of the State of New York. In other words, when we view this case and the respective rulings of the two majority groupings and the three-Judge minority grouping of the Judges of the Court below, from the standpoint of whether the case was disposed of in the Court below merely on a State procedural ground or on a Federal constitutional ground, we must avoid the error of overlooking the fact that

petitioner Siegel was invoking the fundamental and plenary general original equity jurisdiction of the New York State judiciary, and that the three-Judge minority explicitly conceived the issue before the Court as embodying this inescapable Federal constitutional theme of the duty of the New York State judiciary to uphold the Constitution of the United States on the facts and constitutional claims here presented by petitioner Siegel.

As regards the three-Judge dissenting opinion written by Chief Judge Desmond, little more need be said in view of our above references to that dissenting opinion, and since we realize that this Court will naturally devote its own attention to all of the opinions and rulings below. The dissenting opinion written by Chief Judge Desmond (joined by Judges Fuld and Van Voorhis) formulates, as already indicated, the issue of the constitutional duty of the New York State judiciary to find a proper means, within the framework of that State's judicial-procedural arrangements (statutory and constitutional), for exercising the judicial responsibilities commanded by the Federal Constitution upon State Judges when called upon to vindicate the constitutional rights of individuals against trespassory police intrusion upon their privacy.

## REASONS FOR GRANTING THE WRIT

1. We take it that, in the light of *Silverman* v. *United States*, 365 U.S. 505, *Clinton* v. *Virginia*, 377 U.S. 158, and *Wong Sun* v. *United States*, 371 U.S. 471, 485, it is not necessary to offer extended argument on the unconstitutionality of trespassory electronic eavesdropping inside the room space of a lawyer's private office premises. If this case—

involving undenied eavesdropping of the type just mentioned and as to which no claim is made by our adversaries that they acted pursuant to a Court order—were before the Court in the setting of a criminal conviction obtained by such trespassory eavesdrop evidence, we take it that certiorari would be assured. Chief Judge Desmond and his two colleagues in dissent in the Court below wholeheartedly agreed with our contention that the same federal constitutional protection against such trespassory eavesdropping ought to be available by way of the equity jurisdiction of the state courts, and that the aggrieved individual should not have to wait until he is actually in the midst of a criminal prosecution before being accorded his constitutional right to be free of such trespassory police intrusion.

In the light of the comprehensively considered and unequivocally enunciated view of the three-Judge dissenting opinion that this case calls for the exercise by the New York State judiciary of the power to take up the federal constitutional issues tendered by us, the only correct conclusion as to the meaning and effect of the majority opinion below must be that the majority Judges concluded there is no federal constitutional obligation upon the State judiciary to entertain a citizen's suit for equity relief against an indicatedly unconstitutional trespassory eavesdrop by State officers.

Judges Burke and Scileppi in the Court below held in so many words that outside the forum of criminal prosecution the citizen's only protection against such trespassory eavesdrops lies in the ex parte proceedings themselves—from which the victim of the ex parte permitted eavesdrop is of course absent, and indeed in most cases does not even know

of the existence of the ex parte proceedings or, for that matter, of the eavesdrop intrusion.

Judges Bergan and Dye were content to leave matters, in this case, to the discretion of the Appellate Division—which amounts to ruling that the Appellate Division's *total* and *unqualified* rejection of petitioners Siegel's prayers for equity relief on federal constitutional grounds should stand as the final ruling of the New York State Courts in this case.

A word should be said on the theme mentioned earlier in this petition, to the effect that under the present decisional law in New York even the right of suppression or exclusion of unconstitutional eavesdrop evidence in a criminal proceeding remains uncertain at the pretrial stage of the prosecution and is assured only during the actual criminal trial. This topic was comprehensively considered by the New York Court of Appeals within the past month in *People* v. *Burnie McCall et al*, No. 85, 1965 Term, not yet reported, where the question of the availability of pretrial (criminal) review of ex parte eavesdrop orders is deliberately left unsettled. We mention this because we believe it underscores the gravity of the behest made by the three dissenting Judges in the Court below in our case that the New York State Judiciary accept their Federal constitutional obligations to curb trespassory electronic eavesdropping irrespective of whether or not the matter has reached the stage of criminal prosecution on the basis of eavesdrop-obtained evidence.

2. As regards the telephone wiretapping feature of this case, we concede that our within certiorari application takes no comfort from either the minority or the majority opin-

ions below, because the dissenting Judges themselves concluded that, "For the present we would grant no relief as to alleged wiretapping" (Appendix A hereto, *infra*). In other words, the dissenting Judges in the Court below were eschewing any effort, in our case, to swing that Court away from *People* v. *Dinan*, 11 N.Y. 2nd 350, cert. denied 371 U.S. 877. Interestingly, however, in the recent *Burnie McCall, et al.*, decision, *supra* (decided by the New York Court of Appeals just this past month and not yet reported as above mentioned), Chief Judge Desmond and Judge Fuld favored overruling the *Dinan* case. Certiorari should be granted here for that purpose, and in order to effectuate at last the policy expressions of *Benanti* v. *United States*, 355 U.S. 96. Such would be especially appropriate under the facts of our particular case for, as we suggested earlier herein, the telephone wiretap in this case must in any event fall together with the trespassory room eavesdrop. It is self evident that when an electronic room-space eavesdrop is operating in a room where there is a telephone, the room eavesdrop will audit the voices of persons in that room who are speaking into the telephone instruments in that room. The electronic eavesdrops in Petitioner Siegel's law office included both the room "bug" type and the telephone wiretap type. It hardly needs to be pointed out that, until or unless the contrary should be established by due proof, the respondents installed and used both of those forms of electronic eavesdrop in Siegel's law office as a single combined or integrated eavesdrop operation, and that any *ex parte* court order herein was likewise applied for and granted on such combined or integrated basis. In short, the respondents deliberately planned to and they did engage in electronic eavesdropping in petitioner Siegel's law office on a

basis in which it did not matter to the respondents whether the conversations which they picked up were eavesdropped through the telephone wiretap or the room "bug". We emphasize this coalesced or homogenized character of the respondents' use of the two forms of eavesdrop in this case, because such emphasis makes it the more plain that telephone conversations were not only picked up on the room "bug" as a matter of sheer practical and physical inevitability but that such was the deliberate design of the respondents in combining the two types of eavesdrop in Siegel's office. When all of this is perceived, does not the conclusion become inescapable that the telephone wiretap in this case is fatally tainted with unconstitutionality derived both from its sheer physical or technological assimilation into the room eavesdrop, and from its having been an integral and non-severable part of a deliberate design that included the indubitably unconstitutional room eavesdrop? In other words, the respondents are in no position to urge that the particular telephone wiretap here involved may be entitled to be salvaged on some basis of distinctness from the room eavesdrop, because the respondents themselves deliberately chose to make the two forms of eavesdrop indissoluble in this case. That choice of the respondents should be treated as irrevocable under the Constitutional standards by which this case has to be decided. And we therefore submit that, all other considerations or possible distinctions notwithstanding, the telephone wiretap herein must fall together with the room eavesdrop for the reasons presented in this paragraph.

3. Since the record is silent as to any claim by respondents of having had a permissive ex parte court order for the eavesdropping and wiretapping in this case, we of course

concede that there is not *directly* presented the question of the constitutionality of New York's permissive legislation, N.Y. Code Crim. Proc. §813-a. Indirectly, however, this question seems necessarily involved in the case in the following sense: We respectfully contend that *no* system of permissive ex parte Court-ordered eavesdropping or wiretapping can be constitutional under the Fourth and Fifth Amendments. Cf. *Lopez* v. *United States*, 373 U.S. 427, dissenting opinion. It is above all in electronic eavesdropping and wiretapping, where *ipso facto* a "general search" is conducted, that the problem of a "search" for "mere evidence" (*Gouled* v. *United States*, 255 U.S. 298) assumes its most acute form; and N.Y. Code Crim. Proc. §813-a expressly allows ex parte eavesdrop orders upon oath etc. "that there is reasonable ground to believe that evidence of crime may thus be obtained" (see Appendix D hereto, *infra*, p. 19a). We respectfully suggest that *Gouled* is still the law notwithstanding the scholarly ratiocinations in *State* v. *Bisaccia*, 45 N.J. 504, 213 A. 2d 185 and *People* v. *Thayer*, 47 Cal. Rptr. 780, 408 P. 2d 108.

## CONCLUSION

**It is respectfully submitted that this petition for a writ of certiorari should be granted.**

Respectfully submitted,

MATTHEW H. BRANDENBURG
*Attorney for Petitioner*
*Hyman D. Siegel*

ABRAHAM GLASSER
*Of Counsel*

[Appendices follow]

# APPENDIX A

## Opinion of New York Court of Appeals Sought to be Reviewed

## (16 N.Y. 2d 330)

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HYMAN D. SIEGEL,

Appellant,

—v.—

PEOPLE OF THE STATE OF NEW YORK, et al.,

Respondents.

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Argued November 24, 1965; decided December 30, 1965.

Appeal—Court of Appeals—order granting leave to appeal—order of Court of Appeals granting leave to appeal from order of Appellate Division which denied application to vacate ex parte order permitting tapping of telephone and electronic eavesdropping of premises is vacated.

On a petition under CPLR 5704 (subd. [a]) by an attorney who alleged that his telephone was wire tapped and electronic eavesdropping devices were installed in his office premises, pursuant to an ex parte order, to vacate said order and to require disclosure of the order and affidavits, the Appellate Division denied the motion. An order of the Court of Appeals granting leave to appeal from the order of the Appellate Division is vacated.

Reported below, *Siegel* v. *People*, 21 A D 2d 755.

APPEAL, by permission of the Court of Appeals (see 14 N Y 2d 489), from a resettled order of the Appellate Division of the Supreme Court in the First Judicial Department, entered May 21, 1964, which denied an application by

petitioner (1) to vacate an ex parte order permitting (a) wire tapping of petitioner's telephone and (b) electronic eavesdropping of his office premises, and (2) to require disclosure of the order and affidavits.

*Matthew H. Brandenburg for appellant.* I. The indicated eavesdrops (especially the room eavesdrops and the use which respondents have indicatedly made thereof) have worked a denial to Siegel of his constitutional and statutory rights, both State and Federal, which ought to be redressed in this proceeding. (*People* v. *Dinan*, 11 N Y 2d 350, 371 U. S. 877.) II. The eavesdropping herein viewed in its entirety, with particular emphasis on the room-eavesdrop phase, was unconstitutional and illegal. (*Mapp* v. *Ohio*, 367 U. S. 643; *Silverman* v. *United States*, 365 U. S. 505; *Clinton* v. *Virginia*, 377 U. S. 158; *Wolf* v. *Colorado*, 338 U. S. 25; *Wong Sun* v. *United States*, 371 U. S. 471; *Ker* v. *California*, 374 U. S. 23; *Goldman* v. *United States*, 316 U. S. 129; *Olmstead* v. *United States*, 277 U. S. 438; *On Lee* v. *United States*, 343 U. S. 747; *Lopez* v. *United States*, 373 U. S. 427.) III. More specifically as to the telephone wiretap phase, the afore-mentioned 1962 statutory changes in this State were adopted to meet the constitutional command of the *Mapp* case not only with regard to room eavesdrops but likewise with respect to telephone wire taps. (*Benanti* v. *United States*, 355 U. S. 96; *Nardone* v. *United States*, 302 U. S. 379; *Schwartz* v. *Texas*, 344 U. S. 199; *Elkins* v. *United States*, 364 U. S. 206; *Chapman* v. *United States*, 365 U. S. 610; *Pugach* v. *Dollinger*, 277 F. 2d 739, 365 U. S. 458; *Williams* v. *Ball*, 294 F. 2d 94; *Lebowich* v. *O'Connor*, 309 F. 2d 111; *Matter of Landers* v. *O'Connor*, 43 Misc 2d 1040.)

IV. The remedy which is presently sought is available in a CPLR 5704 (subd. [a]) "Special Proceeding" in the Appellate Division. (*People* v. *Lombardi,* 18 A D 2d 177; *Draper* v. *United States,* 358 U. S. 307; *People* v. *Cohen,* 42 Misc 2d 403; *People* v. *Beshany,* 43 Misc 2d 521; *Jones* v. *United States,* 362 U. S. 257; *Hoffritz* v. *United States,* 240 F. 2d 109; *Cheng Wai* v. *United States,* 125 F. 2d 915; *United States* v. *Coplon,* 185 F. 2d 629, 342 U. S. 920; *Sablowsky* v. *United States,* 101 F. 2d 183.) V. An eavesdrop "search" for "evidence of crime" and eavesdropping as a "general search" are *per se* unconstitutional irrespective of any permissive court order. (*Brinegar* v. *United States,* 338 U. S. 160; *Boyd* v. *United States,* 116 U. S. 617; *Gouled* v. *United States,* 255 U. S. 298.)

*Frank S. Hogan, District Attorney* (*Raymond S. Hack and H. Richard Uviller* of counsel), for respondent. I. The appeal should be dismissed. (*De Rosa* v. *Slattery Contr. Co.,* 14 A D 2d 278, 12 N Y 2d 735; *Matter of Barkley* v. *New York Cent. & H. R. R. Co.,* 42 App. Div. 597, 161 N. Y. 647; *Matter of Mitchel* v. *Cropsey,* 177 App. Div. 663; *Matter of Judicial Inquiry Pursuant to Order of App. Div., Second Dept.,* 5 A D 2d 872; *Matter of Willmark Serv. System,* 21 A D 2d 478; *Matter of Police Benevolent Assn. of N. Y. State Police* v. *Gagliardi,* 9 A D 2d 929, 10 A D 2d 874, 9 N Y 2d 803; *People* v. *Cohen,* 41 Misc 2d 158, 42 Misc 2d 403; *Matter of Alpert,* 15 N Y 2d 937.) II. The denial by the Appellate Division of appellant's motion was proper. (*People ex rel. Lemon* v. *Supreme Ct. of State of N. Y.,* 245 N. Y. 24; *Mapp* v. *Ohio,* 367 U. S. 643; *Silverman* v. *United States,* 365 U. S. 505; *People* v. *Grossman,* 45 Misc 2d 557;

*Appendix A—Opinion of New York Court of Appeals Sought to be Reviewed*

*People* v. *Golly*, 43 Misc 2d 122; *People* v. *Scardaccione*, 41 Misc 2d 433; *People* v. *Cohen*, 41 Misc 2d 158, 42 Misc 2d 403, 13 N Y 2d 595; *People* v. *Laverne*, 14 N Y 2d 304.)

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BURKE and SCILEPPI, JJ. The order of this court granting leave to appeal should be vacated. An ex parte application for an order for eavesdropping is criminal in nature (Code Crim. Pro., § 813-a). It always has been the rule that unless there is a provision in the Code of Criminal Procedure permitting an application in connection with, or an appeal from, an order of a criminal nature, no review may be had. There is, of course, no provision in the Code of Criminal Procedure which allows an application to be made to the Appellate Division in connection with any such orders. Therefore, the Appellate Division had no jurisdiction to entertain in the first instance the application addressed to the orders for eavesdropping under CPLR 5704 (subd. [a]). As this is a criminal matter, under our Constitution and statutes relief cannot be authorized by that section. The Appellate Division should have dismissed the proceeding rather than have denied relief. The petitioner having been indicted now may move to suppress evidence illegally secured (Code Crim. Pro., § 813-c; CPLR 4506).

The appellate courts as a matter of first impression may not intervene in the course of an investigation where, as here, orders were obtained, a judicial officer had already determined the propriety of the methods sought to be used by the law enforcement agency, and there exist adequate means of review of that determination. For if the appel-

lant's premises were the subject of an eavesdrop order he is protected, as a citizen, by the requirements of section 813-a, and as a defendant in a criminal case he is protected by statute (CPLR 4506) and Constitution (*Mapp* v. *Ohio*, 367 U. S. 643 [1961]; *Silverman* v. *United States*, 365 U. S. 505 [1961]).

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Chief Judge DESMOND (dissenting). This appeal was properly allowed by us. It brings to us the important and as yet undecided question as to what are the discovery rights of a citizen who learns, or has good reason to believe, that his office or home is being eavesdropped (and wire tapped) pursuant to a secret ex parte order. The petition was addressed to the Appellate Division. The court unanimously and without opinion denied relief. In granting petitioner leave to appeal we necessarily treated the petition as one commencing a civil special proceeding.

Petitioner's allegations may be summarized thus; he is an attorney maintaining a law office in New York City, he believes that his office space has been subjected to electronic eavesdropping by respondent District Attorney the basis for such belief being information received from a named person described as an expert in the field who discovered the installation in the office of "direct wired eavesdropping devices", information from one of petitioner's office associates, an attorney, indicating the eavesdropping of conversations in the office and statements made to clients of petitioner and stenographic transcripts of an examination of several witnesses in a civil suit. This is, therefore, not a case where a citizen merely harbors sus-

picions of eavesdropping or wire tapping and comes into court to have his suspicions confirmed.

The petition alleges that these eavesdropping installations were contrary to various provisions of the Federal and State Constitutions and statutes including the provisions of the New York State Constitution relating to due process of law, unreasonable search and seizure and self incrimination. Relief was demanded as follows: that the District Attorney file an answer admitting the existence of the eavesdrops and giving the text of any court order authorizing them or that he be ordered by the court to disclose to petitioner the order and the affidavits on which it was granted and that the court make such other directions as may be just and proper including vacatur under CPLR 5704 (subd. [a]) of any order permitting an eavesdropping at petitioner's premises.

The District Attorney filed no answering pleading with the Appellate Division but apparently submitted to the court a brief urging that on various grounds the petition be denied.

First, we have a question of procedure arising, primarily, because the application was directed not to the Supreme Court but to the Appellate Division. We need not go so far (see 1 Carmody-Wait, New York Practice, pp. 186-187) as to hold that the Appellate Division has all the original powers given to the Supreme Court by law. The heading of the petition indicates that it is brought pursuant to CPLR article 4 and CPLR 5704 (subd. [a]) indicating the petitioner's theory that he is either instituting a civil separate special proceeding or moving the Appellate Divi-

sion (5704, subd. [a]) to vacate an ex parte order made by a Supreme Court Justice. Subdivision (a) of 5704 seems to carry the same general meaning as sections 66 and 132 of the former Civil Practice Act which said that the Appellate Division or a Justice thereof may "vacate or modify * * * any order * * * of the Supreme Court" or a Justice thereof granted "without notice to the adverse party." The eavesdropping order (and wire tapping order), if there be any such in existence, must have been granted without notice under section 813-a of the Code of Criminal Procedure, and kept secret from the occupant of the premises. 5704 (subd. [a]) is so general and sweeping in language that it should be available for vacatur of any ex parte order. This is particularly true since if that section be not available there is no New York statute providing any relief for a citizen who learns that his premises had been "bugged". It is significant that in enacting 5704 (subd. [a]) the Legislature dropped out one clause in old section 132 of the Civil Practice Act which had bestowed the vacating power as to any order "in an action or special proceeding". Subdivision (a) of 5704, much more broadly stated, applies to "any order of the supreme court or a justice thereof" which has been granted ex parte.

*Silverman* v. *United States* (365 U. S. 505) held that eavesdropping by means of a physical intrusion of electronic devices into private premises is a violation of the Fourth Amendment (similarly, *Clinton* v. *Virginia*, 377 U. S. 158). It would seem (see *Mooney* v. *Holohan*, 294 U. S. 103; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19) that for transgressions of the Constitution, perpetrated by the

State itself, there must be a remedy. It is no answer at all to suggest that petitioner who (so says the District Attorney's brief) has been indicted for a crime must await trial and then object to the admission of the evidence obtained secretly. (Under current decisional law the objection would be overruled [see *People* v. *Pugach*, 16 N Y 2d 504].) Unless there be some discovery granted here, the scope and bearing of the eavesdropped information meanwhile remains unknown. Can it be that a citizen must tolerate a continuing and unconstitutional invasion of his premises until comes the day, if ever, when eavesdropped evidence is offered against him in open court?

There should at least be a judiciary inquiry as to whether material which incriminates petitioner or others was obtained in such manner and for such purpose as to violate the Fifth Amendment of the Federal Constitution or section 6 of article I of our State Constitution.

As to Federal constitutional violations the United States Supreme Court decision which most insistently demands judicial action on this petition is *Griswold* v. *Connecticut* (381 U. S. 479 [June, 1965]). The majority there held that, besides the specifics of the Bill of Rights, there are important and equally fundamental collateral or resulting rights including those setting up "zones of privacy" and including the right to be unmolested in the repose of one's private quarters, as well as the right to be secure therein against physical invasions made for the purpose of obtaining incriminating evidence. It is impossible to read the eloquent and extensive *Griswold* opinions except as meaning that any secret incursion into a private building is a di-

rect and inexcusable violation of the Fourth and Fifth Amendments. We should hold no less as to our State's constitutional guarantees as expressed in sections 6 and 12 of article I of our State Constitution.

Furthermore, it is plausibly argued by appellant that the granting of adequate relief to him is not really inconsistent with our State statutes, particularly CPLR 4506 and Code of Criminal Procedure sections 791 and 813-b, 813-c, 813-d and 813-e, all enacted or re-enacted subsequent to *Mapp* v. *Ohio* (367 U.S. 643). All these statutes in one form or another recognize that the *Mapp* rule is now the law of the States and that evidence obtained in violation of the Bill of Rights, particularly the Fourth Amendment, is outlawed. Indeed, there is some evidence that the Legislature itself had in mind that there might be subsequent judicial proceedings looking to a discovery as to the basis and validity of eavesdropping orders. Section 813-a of the Code of Criminal Procedure requires that, while an eavesdropping order may be issued ex parte and remain unfiled, the issuing Judge must retain a copy thereof and the applicant must receive and retain the order itself. Unless some subsequent scrutiny is to be available, there is no reason for requiring such retentions.

Regardless of what the Federal courts have held or will hold, we should give effect to our own State Constitution by holding at least that a citizen, who has the best of reasons to believe that his premises have been "bugged", may inquire into the grounds therefor and in an appropriate case have an injunction against any continuation of such practices and the use of evidence obtained thereby. It is a first duty of any court to obey the letter and spirit of

controlling law. In *Silverman* v. *United States* (365 U. S. 505, *supra*) true physical eavesdropping was held violative of the Fourth Amendment (see *Wong Sun* v. *United States*, 371 U. S. 471, 485, construing *Silverman* as a holding that the Fourth Amendment protects "against the overhearing of verbal statements" as well as against the unlawful seizure of objects). In *Griswold* v. *Connecticut* (381 U. S. 479, *supra*) it is plainly said that all physical invasions of privacy are illicit. Why should we not forthrightly honor and obey these controlling rules?

The order appealed from should be reversed and the matter remitted to the Appellate Division so that it, or the Supreme Court by direction of the Appellate Division, may conduct a full judicial inquiry as to whether there has been such eavesdropping as is alleged in the petition, as to the asserted bases therefor and as to the information obtained thereby. With such material before us and with appropriate rulings below, we can decide once and for all as to the constitutionality of eavesdropping on private premises in this State. For the present we would grant no relief as to alleged wire tapping.

---

Judges Dye and Bergan concur on the ground that any action of the Appellate Division in this proceeding is purely discretionary and not reviewable by this court and Judges Burke and Scileppi for the reasons stated in their memorandum; Chief Judge Desmond dissents and votes to reverse and to grant partial relief to petitioner in an opinion in which Judges Fuld and Van Voorhis concur.

Order of this court dated October 1, 1964 granting leave to appeal vacated.

# APPENDIX B

## Order (Remittitur) of New York Court of Appeals Sought to be Reviewed

No. 451
(1964)

Filed
Jan 12 1966
Supreme Court

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 30th day of December in the year of our Lord one thousand nine hundred and sixty-five, before the Judges of said Court.

WITNESS,

The HON. CHARLES S. DESMOND,
Chief Judge, *Presiding.*

RAYMOND J. CANNON, *Clerk.*

Remittitur December 30, 1965

---

1. No. 451.

Hyman D. Siegel,

Appellant,

vs.

The People of the State of New York, and Frank S. Hogan, Esq., Individually and as District Attorney of New York County,

Respondents.

---

*Appendix B—Order (Remittitur) of New York Court of Appeals Sought to be Reviewed*

BE IT REMEMBERED, That on the 14th day of November in the year of our Lord one thousand nine hundred and sixty-four, Hyman D. Siegel, the appellant—in this cause, came here unto the Court of Appeals, by Matthew H. Brandenburg, his attorney—,and filed in the said Court a return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People of the State of New York, and Frank S. Hogan, Esq., Individually and as District Attorney of New York County, the respondents in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney, pro se.

Which said return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Matthew H. Brandenburg, of counsel for the appellant— and by Mr. Raymond S. Hack, of counsel for the respondent—and after due deliberation had thereon, did order and adjudge that the order of this Court dated October 1, 1964, granting leave to appeal be and the same hereby is vacated.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, First Judicial Department, there to be proceeded upon according to law.

THEREFORE, it is considered that the said order &c, granting leave to appeal be vacated, as aforesaid.

And hereupon, as well the return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given

*Appendix B—Order (Remittitur) of New York Court of Appeals Sought to be Reviewed*

in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, First Judicial Department before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

RAYMOND J. CANNON
*Clerk of the Court of Appeals of the State of New York.*

Court of Appeals, Clerk's Office,
Albany, December 30, 1965.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

RAYMOND J. CANNON
*Clerk.*

[SEAL]

## APPENDIX C

### Order of Appellate Division Alternatively Sought to be Reviewed

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, and the 21st day of May, 1964.

Present:

HON. CHARLES D. BREITEL,
*Justice Presiding,*

" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" SAMUEL W. EAGER,
*Justices.*

61 and 62

---

Hyman D. Siegel,

Petitioner,

vs.

The People of the State of New York,

Respondent.

---

The order of this Court entered herein on the 19th day of March, 1964, is hereby resettled as follows:

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 19th day of March, 1964.

*Appendix C—Order of Appellate Division Alternatively Sought to be Reviewed*

Present:

Hon. CHARLES D. BREITEL,
*Justice Presiding,*
" FRANCIS L. VALENTE,
" JAMES B. M. MCNALLY,
" SAMUEL W. EAGER,
*Justices.*

61 and 62

Hyman D. Siegel,
Petitioner,
vs.
The People of the State of New York,
Respondent.

The above-named petitioner having moved (by notice of motion and notice of petition) this Court for an order pursuant to C.P.L.R. Section 5704(a) vacating any order of the Supreme Court of the State of New York, County of New York, or of any Justice of said Court which has been or may have been heretofore granted upon application of the respondent The People of the State of New York or of any of said respondent's agents, representatives or attorneys, to wit, any such order which has been or may have been granted as aforesaid without notice to the petitioner, as the adverse party whereby permission was or may have been granted to eavesdrop upon any telephone of said petitioner in his private office premises at 160 Broadway, New

*Appendix C—Order of Appellate Division Alternatively Sought to be Reviewed*

York, New York, or to eavesdrop within, at or near said private office premises in any manner or for any purpose whether on a telephonic-eavesdrop basis or on a room-eavesdrop basis or otherwise; for an order compelling disclosure as to whether any such ex parte eavesdropping order has been entered by the Supreme Court of the State of New York, New York County, or by any Justice of said Court; and for other relief,

Now, upon reading and filing the notice of motion, the notice of petition and petition of Hyman D. Siegel, dated March 22, 1963, with proof of due services thereof, the printed brief and printed reply brief, the affidavit of Matthew H. Brandenburg and letters submitted therewith in support of said motion, and the memorandum of the District Attorney, New York County, in opposition thereto, and after hearing Mr. Matthew H. Brandenburg for the motion, and Mr. Frank S. Hogan opposed,

It is ordered that the said motion be and the same hereby is denied.

ENTER:

VINCENT A. MASSI

Clerk

FRANCIS L. VALENTE

# APPENDIX D

## Constitutional and Statutory Provisions

1. *N. Y. Const., Art. 6, § 7*

§ 7. [Supreme court; jurisdiction; separate divisions]

a. The supreme court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided. In the city of New York, it shall have exclusive jurisdiction over crimes prosecuted by indictment, provided, however, that the legislature may grant to the city-wide court of criminal jurisdiction of the city of New York jurisdiction over misdemeanors prosecuted by indictment and to the family court in the city of New York jurisdiction over crimes and offenses by or against minors or between spouses or between parent and child or between members of the same family or household.

b. There may be separate divisions of the supreme court established by the appellate division of the supreme court in each department for various classes of actions and proceedings.

c. If the legislature shall create new classes of actions and proceedings, the supreme court shall have jurisdiction over such classes of actions and proceedings, but the legislature may provide that another court or other courts shall also have jurisdiction and that actions and proceedings of such classes may be originated in such other court or courts. Adopted by the people Nov. 7, 1961, eff. Sept. 1, 1962.

2. *47 U.S.C. §605*

§ 605. Unauthorized publication or use of communications

No person receiving or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by wire or radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received such intercepted communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided,* That this section shall not apply to the receiving, divulging, publishing, or

utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress. June 19, 1934, c. 652, Title VI, § 605, 48 Stat. 1103.

3. *N.Y. Code Crim. Proc.* § *813-a*

§ 813-a. Ex parte order for eavesdropping

An ex parte order for eavesdropping as defined in subdivisions one and two of section seven hundred thirty-eight of the penal law may be issued by any justice of the supreme court or judge of a county court or of the court of general sessions of the county of New York upon oath or affirmation of a district attorney, or of the attorney-general or of an officer above the rank of sergeant of any police department of the state or of any political subdivision thereof, that there is reasonable ground to believe that evidence of crime may be thus obtained, and particularly describing the person or persons whose communications, conversations or discussions are to be overhead [1] or recorded and the purpose thereof, and, in the case of a telegraphic or telephonic communication, identifying the particular telephone number or telegraph line involved. In connection with the issuance of such an order the justice or judge may examine on oath the applicant and any other witness he may produce and shall satisfy himself of the existence of reasonable grounds for the granting of such application. Any such order shall be effective for the time specified therein but not for a period of more than two months unless extended or renewed by the

[1] So in original. Probably should be "overheard".

justice or judge who signed and issued the original order upon satisfying himself that such extension or renewal is in the public interest. Any such order together with the papers upon which the application was based, shall be delivered to and retained by the applicant as authority for the eavesdropping authorized therein. A true copy of such order shall at all times be retained in his possession by the judge or justice issuing the same, and, in the event of the denial of an application for such an order, a true copy of the papers upon which the application was based shall in like manner be retained by the judge or justice denying the same. As amended L.1958, c. 676, eff. July 1, 1958.

4. *N.Y. Code Crim. Proc. §§ 813-c to e*

## TITLE H-B

### Of Motions for Return of Property or for the Suppression of Evidence Alleged to Have Been Obtained as a Result of Unlawful Search and Seizure [New]

Sec.

813-c. The motion in general.

813-d. Time of making and determination.

813-e. In what courts made.

Title added by L.1962, c. 954, § 1, eff. April 29, 1962.

§ 813-c. The motion in general

A person claiming to be aggrieved by an unlawful search and seizure and having reasonable grounds to believe that the property, papers or things, hereinafter referred to as

property, claimed to have been unlawfully obtained may be used as evidence against him in a criminal proceeding, may move for the return of such property or for the suppression of its use as evidence. The court shall hear evidence upon any issue of fact necessary to determination of the mtoion.

If the motion is granted, the property shall be restored unless otherwise subject to lawful detention, and in any event it shall not be admissible in evidence in any criminal proceeding against the moving party.

If the motion is denied, the order denying such may be reviewed on appeal from a judgment of conviction notwithstanding the fact that such judgment of conviction is predicated upon a plea of guilty. Added L. 1962, c. 954, § 1, eff. April 29, 1962.

§ 813-d. Time of making and determination

1. The motion shall be made with reasonable diligence prior to the commencement of any trial in which the property claimed to have been unlawfully obtained is proposed to be offered as evidence, except that the court shall entertain a motion made for the first time during trial upon a showing that (1) the defendant was unaware of the seizure of the property until after the commencement of the trial, or (2) the defendant, though aware of the seizure prior to trial, has, only after the commencement of the trial, obtained material evidence indicating unlawful acquisition, or (3) the defendant has not had adequate time or opportunity to make the motion before trial.

2. If a motion has been made and denied before trial, the determination shall be binding upon the trial court, ex-

cept that, if it is established that, after the making of such motion, the defendant obtained additional, material evidence of unlawfulness which could not have been obtained with reasonable diligence before the making of the motion, the court shall entertain another motion, or a renewal of a motion, during the trial.

3. When the motion is made before trial, the trial shall not be commenced until the motion has been determined, except that, in the case of misdemeanors and offenses, the court having summary jurisdiction over such crimes and offenses may, by general rule of court, provide that the hearing and determination of such motions may be referred to the trial court for determination during the course of the trial upon the consent of the district attorney, or if no contrary general rule of court has been promulgated, the court before which the motion is made shall have discretion either to entertain the motion, or to refer it to the trial court for determination during the course of the trial if the district attorney consents thereto. When the motion is made during trial, the court shall, in the absence of the jury, if there be one, hear evidence in the same manner as if the motion had been made prior to trial, and shall decide all issues of fact and law.

4. If no motion is made in accordance with the provisions of this title, the defendant shall be deemed to have waived any objection during trial to the admission of evidence based on the ground that such evidence was unlawfully obtained. Added L.1962, c. 954, § 1; L.1964, c. 490, eff. July 1, 1964.

§ 813-e. In what courts made

When an indictment, information or complaint upon which the defendant may be tried for a crime or offense has been filed in a court, or after the defendant has been held by a magistrate to answer a charge in another court, the motion shall be made in the court having trial jurisdiction of such indictment, information, complaint or charge.

Before any indictment, information or complaint upon which the moving party may be tried for a crime or offense has been filed in a court, and before the moving party has been held by a magistrate to answer a charge in another court, the motion shall be made, if in a county outside of the city of New York, in the supreme court or the county court. In the city of New York, the motion, if made prior to September first, nineteen hundred sixty-two, shall be made in a county court or the court of general sessions of the county of New York as the case may be, and, if made on or after September first, nineteen hundred sixty-two, in the supreme court.

If the motion is made in one of such courts before such an indictment, information or complaint is filed, or before a magistrate has held the defendant to answer, and if, before determination of the motion, an indictment, information or complaint is filed in a different court, or the moving party is held by a magistrate to answer in a different court, the court before which the motion has been made shall not determine the motion but shall refer it to the court of trial jurisdiction. If, however, the motion has been determined at the time of the filing of the charge in the different court

or at the time of the holding by the Magistrate to answer in a different court, such determination shall be binding upon the court of trial jurisdiction, except that another motion may be made during trial pursuant to the provisions of section eight hundred thirteen-d. Added L.1962, c. 954, § 1, April 29, 1962.

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IN THE

# Supreme Court of the United States

October Term, 1965

Office-Supreme Court, U.S.
FILED
MAY 23 1966
JOHN F. DAVIS, CLERK

No. 1236

HYMAN D. SIEGEL,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK, *et al.*,

*Respondent.*

**On Petition for Writ of Certiorari to the Court of Appeals of the State of New York**

## RESPONDENT'S BRIEF IN OPPOSITION

FRANK S. HOGAN
*District Attorney*
New York County
*Attorney for Respondent*
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New York, New York 10013

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MALVINA H. GUGGENHEIM
Assistant District Attorneys
*Of Counsel*

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## RESPONDENT'S BRIEF IN OPPOSITION

### Question Presented

Does the decision of the New York Court of Appeals, denying petitioner pre-trial discovery of and challenge to an *ex parte* eavesdropping order, sought pursuant to a State procedural statute, present a constitutional question for review by this Court?